87-617

NO.

IN THE

Supreme Court of the United States

October Term, 1987

EDDIE D. LOONEY,

Petitioner,

v.

GRUNDY NATIONAL BANK,
JO S. WIDENER, TRUSTEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals misinterpret 11 U.S.C. §102 as read in conjunction with 11 U.S.C. §362?

2. Is an order continuing the automatic stay in effect an appealable order under the collateral order doctrine as enunciated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)?

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

Eddie D. Looney,
Petitioner

vs

Grundy National Bank
Jo D. Widener, Trustee
Respondents

Petition for Certiorari - Bankruptcy,
Federal Procedure

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Eddie D. Looney, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case of July 14, 1987.

Opinion Below

The opinion of the Fourth Circuit Court of Appeals is reported at 823 F.2d 788 (4th Cir. 1987) and is printed in Appendix A at page 18-37. The Memorandum Opinion of the United States District Court for the Western District of Virginia is printed in Appendix A at page 39-48. The order of the United States District Court is printed in Appendix A at page 38.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit (Appendix A, page 18) was entered on July 14, 1987. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

Statutes, Federal Rules, and Regulations Involved

11 U.S.C. § 102: (in pertinent part)

§102. Rules of construction. In this title —

(1) "after notice and a hearing", or a similar phrase —

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if —

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

11 U.S.C. § 362: (in pertinent part)

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay ---

> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
> (2) with respect to a stay of an act against property under subsection (a) of this section, if ---
>
> (A) the debtor does not have an equity in such property; and
> (B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at

the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

28 U.S.C. § 158: (in pertinent part)

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

Statement

This case arose when Grundy National Bank (Grundy) filed a motion to relieve the automatic stay of the Bankruptcy Code (11 U.S.C. §362) against the petitioner Eddie Looney (Looney), a Chapter 13 debtor. The bankruptcy court entered an order continuing the automatic stay, stating "notice of this order is deemed notice and opportunity for hearing under Section 102." (Appendix page 50) Grundy National Bank then filed an appeal to the United States District Court,

contending that the bankrutpcy court's order was in violation of 11 U.S.C. § 362(e) which Grundy argued required notice and hearing within 30 days of the filing of the motion.

The district court affirmed the bankruptcy court's decision, finding that Congress intended to grant to the bankruptcy court the authority to continue the automatic stay in effect pending a hearing (Appendix A, page 45) and that the bankruptcy court could act without a hearing.

The United States Court of Appeals for the Fourth Circuit reversed the district court, holding that "The statutory procedure to be followed in adjudging a motion for relief from the automatic stay requires some form of

'notice and a hearing'" (Appendix A, page 21). The court of appeals rejected the District Court's interpretation of 11 U.S.C. § 102 (Appendix A, page 30) and found that an actual notice was required to be given to Grundy.

The original basis for jurisdiction in the district court was 28 U.S.C. § 158(a). The court of appeals found that even though it did not have jurisdiction under 28 U.S.C. §158(a), "jurisdiction lies in this case under the collateral order doctrine enunciated in Cohen v Beneficial Industrial Loan Corp. 337 U.S. 541 (1949)." (Appendix A, page 25)

Argument

The decision below should be reviewed because it is in direct conflict with a recent decision of the United

States Court of Appeals for the Fifth Circuit. A clarification of the meaning and use of 11 U.S.C. §102 as it is read in conjunction with 11 U.S.C. §362(e) is imperative. Additionally, the decision by the court of appeals of the "collateral order doctrine" to find jurisdiction is in direct conflict with a Tenth Circuit decision.

1. During the past six months, two courts of appeals have issued opinions on the meaning of 11 U.S.C. §102(1)(A), when read in connection with 11 U.S.C. §362. Each case has reached a different conclusion. In the case under review, Grundy argued and the Fourth Circuit agreed that the phrase "after notice and a hearing" in § 362 of the Bankruptcy Code required a notice and a hearing (Appendix A, page 21).

However, the Fifth Circuit in the case of In Re River Hills Apartment Funds, 813 F.2d 702(5th Cir. 1987) found:

> Section 362(d) permits the bankruptcy court to grant relief from the automatic stay on the request of a "party in interest and after notice and a hearing." . . .
>
> Section 362(d), however, does not require the bankruptcy court to hold a hearing in every case in which a creditor seeks relief from the automatic stay. The words "after notice and a hearing" in that section have a meaning different from the command derived from the phrase "the court shall hold a hearing," which appears elsewhere in the Bankruptcy Code. The Code defines "after notice and a hearing" as "after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances." [Citation omitted]. The primary purpose of this definition, as described in its legislative history, is to eliminate the direct involvement of the bankruptcy court in administrative matters such as the approval of requests for relief absent a dispute.

The legislative history of §102 shows that the phrase "after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances. . ." was intended by the drafters of the legislation to be "central to the bill and to the separation of the administrative and judicial functions of the bankruptcy judge." Senate Committee on the Judiciary Bankruptcy Reform Act of 1978, S. Rep. No. 989, 95th Cong., 2d Session 27 (1979).

In fact, the legislative history states specifically that

> "the phrase means after such notice as is appropriate in the particular circumstances (to be prescribed by either the Rules of Bankruptcy Procedure or by the court in individual circumstances that the

> Rules do not cover. In many cases, the Rule will provide for combined notice of several proceedings), and such opportunity for hearing as is appropriate in the particular circumstances. Thus a hearing will not be necessary in every instance." Id.

Collier on Bankruptcy calls the rule of construction of §102(1) "vital to the operation of the Bankruptcy Code." Collier on Bankruptcy 102.02 (15th ed. 1978). The purpose of this section, according to Collier, is twofold: (a) a separation of administrative and judicial functions, and (b) the expeditious handling of cases. The Fourth Circuit decision does not comply with the legislative history or plain meaning of the law, and must be reviewed.

2. The Court of Appeals found that it had jursidiction by using the collateral order doctrine.

The Fourth Circuit found that under the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) the decision of the district court was appealable. In doing so, it ignored the mandate of this Court that the doctrine be a "narrow exception" Firestone Tire and Rubber Co. v. Risjord 44 U.S. 368, 374 (1981). As this Court said, "To fall within the exception it must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreversable on appeal from a final judgment." Richardson-Merrill, Inc. v. Koller, 472 U.S. 424, 43 (1985).

Other circuits have not found orders granting or denying a stay of proceedings in a Bankruptcy Court to be appealable orders under the Bankruptcy Code. Denial of a stay was not an appealable order in Evilsizor v. Eagle Picher Industries, Inc. 725 F.2d 97 (10th Cir. 1984). "For order to be appealable under collateral order doctrine, its consequences for appellant must be irreversible by subsequent proceedings." Matter of UNR Industries 725 F.2d 1111 (7th Cir. 1984). In addition, the Ninth Circuit has found that, under the collateral order doctrine, it could not address the issue of the constitutionality of a bankruptcy judge's appointments, and the sixth Circuit has found that purely administrative decisions could not be appealed In Re Benny, 791 F.2d 712 (9th Cir. 1986); In Re Rini 782 F.2d 603 (6th Cir. 1986).

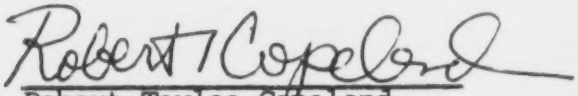
A review of the decision below shows that it did not fit within the Cohen tests in at least one respect: the decision did not conclusively determine the real issue of whether the relief from stay should be granted. The Fourth Circuit obviously wanted to hear this case but by doing so transformed "the limited exception" carved out by Cohen into a license for broad disregard of the finality rule imposed by Congress . . ." Firestone, 440 U.S. at 378.

3. The questions raised by this case can have a significant impact upon the administration of justice. Rural areas in this country, such as Southwestern Virginia, whence this case arose, often have a jduge who rides a circuit, holding court in several divisions. The purpose of §102 is to allow the efficient use of

judicial resources to cope with crowded dockets. By using §102, the bankruptcy judges have more flexibility in scheduling hearings, both for the efficiency of the court and the convenience of the parties before it. The Fourth Circuit's interpretation of the Bankruptcy Code prevents efficient administration of the docket. The Court needs to resolve the split of authority between the circuits in order to give meaning to §102 and correct a judicial misinterpretation. Although the Court has recently examined the collateral order doctrine, the split among the circuits in bankruptcy calls for further examination.

Conclusion

For the reasons stated above, it is respectfully requested that this petition for a writ of certiorari should be granted.



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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2660

In Re: Eddie D. Looney; Judy Looney,
Debtors,

Grundy National Bank,
Plaintiff-Appellant,

versus

Eddie D. Looney; Judy Looney;
Jo S. Widener, Trustee,

Virginia Bankers Associatin; Dominion Bank, National Association Amicus Curiae
Defendant-Appellees

Appeal from the United States District Court for the Western District of Virginia, at Big Stone Gap. Glen M. Williams, District Judge (CA-86-127).

Argued: April 10, 1987
Decided: July 14, 1987

Before RUSSELL, ERVIN, and CHAPMAN,
Circuit Judges.

Michael Leon Shortridge for Appellant; Robert Tayloe Copeland (E. Gay Leonard; Copeland, Molinary & Bieger on brief) for Appellees; (John W. Edmonds, III; Fred W. Palmore, III; Mays & Valentine on brief) for Amicus Curiae Virginia Bankers Association; (David A. Farnham on brief) for Amicus Curiae.

ERVIN, Circuit Judge:

This is an appeal from an interlocutory order, entered July 22, 1986, by the United States Bankruptcy Court for the Western District of Virginia. Appellant, Grundy National Bank ("Grundy"), filed a motion[1] pursuant to 11 U.S.C. § 362(d) (1982) for relief from the automatic stay of 11 U.S.C. §362(a) (1982). The stay protected the assets of the appellees ("the Looneys") following

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[1] The district court, in affirming the bankruptcy court decision, listed the date of filing of this motion as August 7, 1986, and then used this date of filing in calculating the length of the stay extension to be only four days. It appears that the motion was actually filed on July 7, 1986. This error of fact led the district court to conclude that "granting an extension of only four days seems appropriate without any notice or hearing." On remand, careful attention should be paid to the actual date of filing by Grundy.

their filing of a petition in bankruptcy on or about June 18, 1986. In response to Grundy's motion, the bankruptcy court, without a hearing, ordered that the stay remain in effect until the final hearing on the merits of the motion for relief from the stay, which the court at the same time scheduled for September 11, 1986. Grundy appealed the bankruptcy court's order to the United States District Court for the Western District of Virginia on July 28, 1986. The district court affirmed the order of the bankruptcy court. We reverse.

The statutory procedure to be followed in adjudging a motion for relief from the automatic stay requires some form of "notice and hearing." 11 U.S.C.A. § 362(e) (West Suppl. 1986).[2]

The question presented to us, on the merits, is whether the notice and hearing requirement of § 362(e) was met in this case or, alternatively, whether the bankruptcy court's action was proper as an exercise of its equitable powers under Fed. R. Civ. p. 65 and 105(a) of the Bankrutpcy Code. As a preliminary matter, however, we must determine whether we have jurisdiction to hear this appeal.

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2 The statute requires that:

> Thirty days after a request under subsection (d) of this section for relief from stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary

I.

Federal district courts have the power to entertain appeals from interlocutory orders of bankruptcy courts by leave of the district court, as well as to hear appeals as of right of final orders from bankruptcy courts. See 28 U.S.C. § 158(a) (1982). Appeals from district courts under § 158(a) "shall be

---

2 (Cont.) hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

11 U.S.C.A. § 362(e) (West Suppl. 1986) (emphasis added).

taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district court." 28 U.S.C. § 158(c) (1982). Section 158(d) provides that "[t]he courts of appeals have jurisdiction of appeals from all final decisions, judgments, orders and decrees entered under subsections (a) and (b) of this section."

Even though the standard for finality of bankruptcy court orders is relaxed from that of non-bankruptcy district court orders under 28 U.S.C. § 1291, see A. H. Robins Co. v. Piccinin, 788 F.2d 994, 1009 (4th Cir. 1986), the order in this case is not a final order because it does not resolve the litigations, decide the merits, settle liability, establish damages, or determine

the rights of even one of the parties to the Looney's bankruptcy case. Cf. Coopers & Lybrand v. Livesey, 437 U.S. 463, 467 (1978) (concerns finality under § 1291); Catlin v. United States, 324 U.S. 229, 233 (1945) (same). The district court below explicitly viewed the bankruptcy court's order as interlocutory, and the order lacks those characteristics that this court identified in Piccinin as substitutes in the bankruptcy context for traditional indicia of finality. See Piccinin, 788 F.2d at 1009.[3]

Jurisdiction nevertheless lies in this case under the collateral order doctrine enunciated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). To be reviewable despite the absence of finality, an order "must conclusively determine the disputed

question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand, 437 U.S. at 468 (footnote omitted). In this case, the bankruptcy court order, issued without notice or a hearing, conclusively determined Grundy's statutory right to have the automatic stay lifted, unless the Looneys showed a reasonable likelihood of prevailing on the merits, within thirty days of the filing of Grundy's motion for relief. This right is an important protection for creditors

---

3 Because the federal district courts are empowered to review interlocutory decisions of bankruptcy courts, the question has arisen whether a final order of a district court that pertains to an interlocutory decision of a bankruptcy

of the value of collateral. A denial of review by this court "would render impossible any review whatsoever," Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 376 (1981), of the bankruptcy court's order.

II.

The district court upheld the bankruptcy court's decision by relying on the language of 11 U.S.C. § 102 (1982), which contains rules of construction for the Bankruptcy Code. Section 102 defines the phrase "after notice and a hearing" in a way that does not require an actual hearing in some circumstances:

---

3 (Cont.) court is a final order for purposes of circuit court review. We are in agreement with the courts of appeals which have held that such a case does not present a reviewable final order under § 158(d); ordinarily, both the district court and the bankruptcy court orders must be final orders before the court of

§ 102. Rules of Construction

In this title ---

(1) "after notice and a hearing", or a similar phrase ---

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if ---

---

3 (Cont.) appeals has jurisdiction. See, e.g., In re Stanton, 776 F.2d 1283, 1285 (9th Cir. 1985); In re Pizza of Hawaii, Inc., 761 F.2d 1374, 1378 (9th Cir. 1985); In re American Colonial Broadcasting Corp., 758 F.2d 794, 800-01 (1st Cir. 1985); In re Mason, 709 F.2d 1313, 1315 (9th Cir. 1983); Maiorino v. Branford Savings Bank, 691 F.2d 89, 93 (2d Cir. 1982); International Horizons v. Committee of Unsecured Creditors (In re International Horizons, Inc.), 689 F.2d 996, 1000 (11th Cir. 1982); cf. Universal Minerals, Inc., v. C.A. Hughes & Co., 669 F.2d 98, 101 (3d Cir. 1982) (finding a bankruptcy court decisin to have been final rather than interlocutory in order to support appellate jurisdiction).

> (i) such a hearing is not requested timely by a party in interest; or
>
> (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such an act. . .

11 U.S.C. § 102 (1982). The district court interpreted both § 102 and the language of § 362(e) to allow the bankruptcy court to continue the stay pending disposition of a motion for relief from the stay.

However, the bankruptcy court took its action without affording any notice whatsoever to Grundy. While § 102, read

in conjunction with § 362(e), does not require actual preliminary hearings in all cases when a bankruptcy court continues the automatic stay in the face of a motion for relief from the stay, it requires at a minimum that notice be given to the parties before taking such action, to allow them, for example, to request an actual hearing. Grundy and the amici[4] claim that the bankruptcy judge who issued the order that led to this appeal routinely grants continuances of the automatic stay without providing notice or a preliminary hearing. If that allegation is correct, the practice must be ended;

---

[4] Amicus briefs were filed in this case by the Virginia Bankers Association and Dominion Bank, National Association.

the statute contemplates that "notice and a hearing" requires an actual hearing in all but exceptional cases. Even in those exceptional cases, the bankruptcy court must make a determination that the party opposing the motion is reasonably likely to prevail on the merits.

Section 362(e) was enacted to prevent the practice under the old Bankruptcy Act of "injunction by continuance." The legislative history is clear on this point:

> Subsection (e) provides protection that is not always avilable under present law. The subsection sets a time certain within which the bankruptcy court must rule on the adequacy of protection provided for the secured creditor's interest. If the court does not rule within 30 days from a request by motion for relief from the stay, the stay is automatically terminated with

> respect to the property in question. To accommodate more complex cases, the subsection permits the court to make a preliminary ruling after a preliminary hearing. After a preliminary hearing, the court may continue the stay only if there is a reasonable likelihood that the party opposing relief from the stay will prevail at the final hearing.

S. Rep. No. 989, 9th Cong., 2d Sess. 53, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5839. The primary assets of the Looneys at issue in this case are two trucks and a personal residence, so this can hardly be said to be a "complex case" within the meaning of the legislative history of § 362(e). Even if it appeared complex, the courts below erred in interpreting § 362(e) and § 102 to allow

the denial, sua sponte and without notice or a determination of the likely outcome of the case, of a motion for relief from the automatic stay. Such an interpretation completely ignores the specific requirements of § 362(e).

III.

The bankruptcy court's equitable powers were not invoked in this case in a way that would allow continuance of the automatic stay without a hearing. Bankruptcy Rule 7065 allows temporary restraining orders or preliminary injunctions to be issued in bankruptcy cases without compliance with Fed. R. Civ. p. 65(c), which requires the party moving for an injunction to give security. However, such injunctions are to be given "on application of a debtor, trustee or debtor in possessin." Bankr. R. 7065. In

this case, there was no such application. The bankruptcy court acted sua sponte. Nor was there conformity with the other requirements of Fed. R. Civ. p. 65, such as notice or an attempt to give notice to the adverse party, an allegation of irreparable harm, and a determination of likely success on the merits by the debtor. The extension of the automatic stay cannot be upheld on these grounds. This same bankruptcy judge has held that he lacks power to reinstate the automatic stay after it is terminated, despite the presence of Bankr. R. 7065 and Fed. R. Civ. p. 65. See In re Sykes, 53 Bankr. 107, 108 (Bankr. W.D. Va. 1985). But cf. In re Walker, 3 Bankr. 213, 214 (Bankr. W.D. Va. 1980) (same judge holds that, even if the automatic stay terminates

after thirty days, court can use its § 105(a) power to protect a debtor's estate).

Under 11 U.S.C. § 105(a) (1982), "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." The bankruptcy judge in this case did not purport to act under this section, but on appeal the Looneys urge that it is an alternative ground on which to sustain the lower courts' rulings. Several courts have allowed, by reference to § 105(a) powers, the reinstatement of automatic stays that had terminated. See In re Martin Exploration Co., 731 F.2d 1210, 1214 (5th Cir. 1984); Bank Hapoalim B.M. v. E.L.I., Ltd., 42 Bankr., 376, 378 (N.D. I11. 1984). But the actions of this

bankruptcy court, purportedly acting under § 362(e), cannot be countenanced on the basis of the powers granted in § 105(a). Given the clear legislative history of § 362(e), it strains reason to say that the routine continuation of the automatic stay "is necessary or appropriate to carry out the provisions" of the Bankruptcy Code.

The Looneys contend that the bankruptcy docket for the Western District of Virginia is too crowded for one judge to serve it without bending the rules. There may be a need for more bankruptcy judges in the district, but this argument does not suffice to justify altering the procedure for lifting the automatic stay. The provisions governing relief from the automatic stay exist to protect secured creditors and it is not acceptable to

ignore the rules because the court has a crowded docket. Congress clearly intended to limit the period following a motion to lift the automatic stay to thirty days, unless the bankruptcy court finds affirmatively that the debtor is likely to prevail in the end.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

GRUNDY NATIONAL BANK, Appellant	)	Civil Action No. 86-0127-B
v.	)	Bankruptcy No. 7-86-00912-B
Eddie D. Looney and Judy Looney, debtors Jo S. Widener, Trustee, Appellees	)	ORDER

For reasons set out in a Memorandum Opinion entered this date, the decision of the United States Bankruptcy Court for the Western District of Virginia continuing the 11 U.S.C. § 362(a) automatic stay is AFFIRMED. This case is accordingly DISMISSED and stricken from the docket of this court.

The Clerk is directed to send certified copies of this Order to counsel of record and the bankruptcy court.

ENTER: This 10 day of November, 1986.

/s/ Glen M. Williams
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

GRUNDY NATIONAL BANK, Appellant	)	Civil Action No. 86-0127-B
v.	)	Bankruptcy No. 7-86-00912-B
Eddie D. Looney and Judy Looney, debtors Jo S. Widener, Trustee, Appellees	)	MEMORANDUM OPINION

The appellant, Grundy National Bank, appeals the interlocutory order of the United States Bankruptcy Court for the Western District of Virginia entering a preliminary order continuing the 11 U.S.C. § 362(a) automatic stay. 28 U.S.C. § 158(a) confers jurisdiction upon this court.

I.

BACKGROUND

On or about June 18, 1986, the appellees filed a Chapter 13 petition in the United States Bankruptcy Court for the

Western District of Virginia. Pursuant to 11 U.S.C. § 362(a) an automatic stay issued which prevented the appellant from recovering its secured property. On July 7, 1986 the appellant filed a motion for relief from the automatic stay. 11 U.S.C. § 362(d). On July 22, 1986 the bankruptcy court ordered that the automatic stay shall remain in effect until the final hearing on the merits. The court scheduled the hearing for September 11, 1986. The appellant filed a designation of record and statement of issues on appeal on August 1, 1986 seeking a determination, that the bankruptcy court's order continuing the automatic stay, was in direct violation of 11 U.S.C. §362(e).

II

OPINION

The appellant contends that the bankruptcy court continued the 11 U.S.C. § 362(a) automatic say in violation of 11 U.S.C. § 362(e). The automatic stay continues until the case is closed or dismissed or until a discharge is granted or denied. 11 U.S.C. § 362(c). However, if a party in interest requests relief from the stay under § 362(d), the stay terminates thirty (30) days after the request,[1] "unless the court, after notice and hearing, orders such stay continued in effect pending the conclusion of . . . a final hearing and determination under subsectin (d) . . . ." 11 U.S.C. § 362(e)

---

[1] 11 U.S.C. § 362(e) provides:

> Thirty days after a request under subsection (d) of this section for relief from the stay of act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such

The appellant requested relief from the automatic stay on August 7, 1986. Therefore, the stay was to terminate on September 6, 1986, but the bankruptcy

---

1 (Cont.) request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

court ordered the stay to continue in effect until September 11, 1986 pending the conclusion of the final hearing. Appellant contends that the continuation of the stay was improper because the bankruptcy court did not comply with the "notice and hearing" requirements in § 362(e). The central isue is thus, whether the bankruptcy court complied with the "notice and hearing" requirements of § 362(e). The fact that the bankruptcy court continued the stay without an actual hearing is undisputed, therefore, it appears that appellant's claim is meritorious.

11 U.S.C. § 102, however, contains rules of construction; one of which defines the phrase "after notice and a hearing" as used in title 11. After notice and a hearing

> (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstance; but
>
> (B) authorizes an act without an actual hearing if such notice is given properly and if--
>
> > (i) such a hearing is not requested timely by a party in interest; or
> >
> > (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

11 U.S.C. § 102(1). The language indicates that the court does not have to have an actual hearing in order to comply with § 362(e). In order to decide if the bankruptcy court's actions were proper, it is important to understand § 362. Upon motion of an interested party, § 362(d) allows a court to grant relief from the

automatic stay after notice and a hearing. After the party requests this relief, the automatic stay terminates after thirty (30) days. Therefore, it is important to have the hearing under (d) within thirty (30) days so that the bankruptcy court can reach the merits before the thirty (30) days expire. Congress anticipated, however, that in certain instances, the bankruptcy court would not be able to conduct a final hearing within the thirty (30) days and, therefore, gave the court the authority to continue the automatic stay until a hearing on the merits is completed. § 362(e) allows the bankruptcy court to continue the stay "after notice and a hearing." Appellant would have this court interpret that phrase to mean that the court must hold an actual hearing (in

all probability a hearing as contemplated by §362(d)). If this court were to accord the phrase "after notice and a hearing" in §352(e) (sic) the same meaning that it has in § 352(d), (sic) then §352(e) (sic) becomes completely obsolete. The bankruptcy court, therefore, would have to hear the merits of the claim before it could continue the stay. This would require the court to hear the merits within thirty (30) days to be able to extend the stay.[2] This result obviously does not reflect Congress' intention.

Likewise, §102(1) supports appellees' contention that the continuation was proper.

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[2] It is important to note that once the bankruptcy court hears the merits of the claim, then there is no need for a continuation of the stay. The court at the stage may simply proceed to deny or grant the moving party's motion.

§102(1) measures the appropriateness of the notice and hearing. In the instant case, granting an extension of only four days seem appropriate without any notice or hearing. Additionally, §102(1) (B) specifically states that the court may act without an actual hearing. Section 102(1) considers if there is sufficient time for a hearing to be commenced. In the instant case, if there were time for hearing to comply with the appellant's interpretation of §362(e), then there should have been sufficient time for a hearing under § 362(d). The mere fact that there is insufficient time for the §362(d) hearing before the thirty (30) days expire indicates that there probably is insufficient time for the §362(e) hearing

before the expiration of the thirty (30) days. For the reasons set out above, this court concludes that the bankruptcy court's continuation of the automatic stay pursuant to § 362(e) was proper. An appropriate order will be entered.

The Clerk is directed to send certified copies of this Memorandum Opinion to counsel of record and to the United States Bankruptcy Court for the Western District of Virginia.

ENTER: This 10 day of November, 1986.

/s/ Glen M. Williams
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

RE:	)	CHAPTER 13
Eddie D. Looney	)	Case No. 7-86-00912
Judy Looney	)	
Debtors	)	
Grundy National Bank	)	
Movant	)	Motion # 1
v.	)	
Eddie D. Looney	)	
Judy Looney	)	
Jo D. Widener, Trustee	)	

ORDER

For good cause shown, it is

ORDERED

the stay shall remain in effect pending a hearing on the merits of the case.

Service of a copy of this Order shall be made by mail this day to counsel for the Movant(s), counsel for the

Respondent(s), if known, Debtor(s), and to the Trustee, if applicable, and notice of this Order is deemed notice and opportunity for hearing under Section 102.

Date: 7/22/86

/s/ H. Clyde Pearson
Judge